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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ESPARZA,

Defendant and Appellant.

D074298

(Super. Ct. No. SCD274758)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin and Polly H. Shamoon, Judges. Affirmed, request for judicial notice denied.

Ashley N. Johndro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Warren H. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In March 2018, Felipe Esparza pleaded guilty to possession of a firearm by a felon (Pen. Code,¹ § 29800, subd. (a)(1); count 1) and possession of ammunition by a prohibited person (§ 30305, subd. (a)(1); count 2). The written change of plea reflects the plea was based in part on the trial court's commitment to a "two-year lid" on the sentence. The form also reflected a so-called "*Cruz*"² waiver where Esparza agreed the court could reconsider the potential sentence if, among other things, Esparza failed to appear for sentencing.

Esparza failed to appear for sentencing. He was later arrested and appeared for sentencing in June 2018. The trial court declined to follow the previous "lid" agreed to by the court, finding a "*Cruz*" error. Esparza was sentenced to the aggravated term of three years in prison.

Esparza appeals challenging the upper term sentence. He argues the trial court misunderstood his probationary status at the time of the current offense and therefore made its sentencing decision without being fully informed of the fact. He contends the court's misunderstanding of the record requires us to remand the case for resentencing. After our review of the record, we conclude any possible misunderstanding of the record at sentencing was insignificant in the trial court's sentencing decision. We are satisfied beyond a reasonable doubt that any error was harmless.

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Referring to *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

The facts of the underlying offense are not important to our discussion, so we will omit the traditional statement of facts. We do feel constrained to identify what this case is not about since the briefing and the record are not models of clarity.

Defense counsel did not file a statement in mitigation, although counsel advised the court, after the sentence had been pronounced that he had intended to file mitigating information. Counsel also took the position that Esparza's failure to appear did not void the two-year lid because the lid had been agreed to by the court and the prosecutor did not sign the change of plea. Thus, counsel contended the *Cruz* waiver was not triggered and the court could not impose a three-year term. The trial court disagreed.

Esparza has not challenged the current sentence on any claim the trial court erred in interpreting *Cruz*. Nor has Esparza challenged the trial court's and the probation officer's assessments that the factors in aggravation of the sentence outweigh any mitigation. The only challenge here is the claim the court misunderstood whether Esparza was on summary probation for two misdemeanor convictions in 2017 when he was arrested for the current offenses. Indeed, the 2015 sentence imposed on Esparza for the misdemeanors was a denial of probation and imposition of a custodial sentence. It is also crystal clear the trial court's brief reference to probationary status at the time of the offense was utterly insignificant in the overall decision to impose the upper term.

DISCUSSION

A. Background

The probation report for this case indicated Esparza had been arrested after a probation search of the house where he was staying. His brother, Alexander Esparza,

was apparently on probation at the time of the search and arrest. The report did not discuss Esparza's probationary status at that time.

Later in the report Esparza's dismal criminal history was set out. The last listed offense prior to the current crimes was a conviction in 2015 for drunk driving. The report indicates the court denied probation at that time and sentenced Esparza to 120 days in custody. It does appear from the probation report that Esparza was not on summary probation at the time of the current offenses.³

Esparza did not file any statements in mitigation or raise any concerns about the clarity of the probation report prior to sentencing. Indeed, counsel's focus was an effort to mitigate Esparza's willful failure to appear for sentencing so he could visit his children in San Bernardino. He did not surrender after the visit but was arrested on a bench warrant. The trial court was not impressed with Esparza's explanations and criticized him for hiding behind his children. It was in the process of the court criticizing Esparza that it made the passing comment: "he plead guilty to a crime while he was on probation for yet another crime. He had a date to appear in court based on indications of what he would get. He cared so much about that indication [the two-year lid] that he blew it off."

After sentence was imposed defense counsel made the following comments:

"Your honor, just, if I may, I don't believe Mr. Esparza was on probation. I believe he's been on probation since at least a 2013 incident. I know there's a 2015 incident, but I believe there was no

³ Since there is no real doubt that Esparza was not on summary probation for drunk driving when arrested for the current offense, we will deny the request for judicial notice of the minute order from the 2015 misdemeanor conviction, which was not before the trial court.

probation there. Also, I had intended to present some information to the court in mitigation both for a low term and for probation. I will submit to the court regarding the need to hear that, but I did make a record here, so, I have intended to do so. I'll submit to the court, and as I previously indicated, it's our position that the court is bound by the two year lid that it wasn't a negotiated disposition."

The court responded: "You've made your record, and to that, I disagree. It's three years state prison commitment."

In his opening brief, Esparza takes the judges remarks out of context. He quotes the first three sentences of his remarks regarding Esparza's probationary status. He omits counsel's comments that followed addressing the impact of his failure to appear and his argument that the court was bound to impose the originally indicated two-year term. It is obvious the trial court's stated disagreement, immediately following counsel's *Cruz* related statements, expresses the court's views on the *Cruz* issue and not the question of whether Esparza was on probation for a misdemeanor at the time of his arrest.

As a last background topic before we reach the substance of Esparza's contention, we note the People argue the court relied on the probation report and Esparza has forfeited the current issue by failing to challenge the report in the trial court. It appears the People have misread the report. While the report reflects Esparza's dismal, violent and persistent criminal history, it does not report Esparza was on probation when arrested this time. His brother, Alexander, is identified as the one whose probationary status justified the search of the residence. Accordingly, we reject the People's argument for forfeiture.

B. Analysis

At the risk of repetition, this appeal does not challenge the trial court's decision to reject the "indicated lid" after Esparza's failure to appear for sentencing. Nor does the appeal challenge the court's upper term choice for any reason other than the court's apparent mistaken view that Esparza was on summary probation for a misdemeanor when arrested in this case. Nor do the parties dispute the assertion that a court's failure to understand its discretion or its mistake about some material fact may justify setting the sentence aside and remanding a case for a new hearing on accurate information.

(*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

The court in *People v. Lara* (2001) 86 Cal.App.4th 139, 165, stated that in order to exercise "the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision." Misinformation as to a material fact can negate "informed discretion." (*Id.* at p. 166.)

The court's single, passing comment about Esparza being on summary probation for a misdemeanor when arrested was wrong. The trial court denied probation and put Esparza in jail for 120 days for that offense. Thus, while he was not on summary probation, that was because the court denied probation. The fact a judge chose substantial jail time instead of, yet another grant of probation was hardly a ringing endorsement of Esparza's character or his trustworthiness.

The rule requiring informed discretion does not condemn a trial court's insignificant error. Undoubtedly, courts in busy calendar departments will make a factual

mistake from time to time. Hopefully, trial counsel, or maybe even a prosecutor, will correct any significant errors. Defense counsel did not mention the possible error about the summary probation comment until after sentence had been imposed. Counsel's own remarks on that topic were brief as counsel's principal challenge was to the application of the *Cruz* waiver, not pursued here.

Esparza has a long and miserable history of criminal conduct since he was a juvenile in 1992. He has been to prison and has engaged in multiple acts of violence. In the present case, he illegally possessed a firearm and ammunition. His history together with his willful failure to appear for sentencing all clearly supported the court's upper term sentence choice. It is inconceivable on this record and the court's belief Esparza was on summary probation for a misdemeanor, produced a different result than if the court knew Esparza was denied probation and sentenced to jail.

We are satisfied, beyond a reasonable doubt that any mistake on the part of the court did not contribute to the sentencing decision.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.